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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

Number 876

ATHENIAN REALTY CORPORATION,
Petitioner,
v.
SOUTHWESTERN BELL TELEPHONE COMPANY
and
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondents.

BRIEF

For Respondents in Opposition to Petition for Writ of Certiorari.

F. MARK GARLINGHOUSE,
1010 Pine Street,
St. Louis, Missouri,
ED GOSSETT,
J. H. HAND,
308 South Akard Street,
Dallas, Texas,
KENNETH R. MADSEN,
DONALD W. MEEKER,
811 Main Street,
Kansas City, Missouri,
Attorneys for Respondents Southwestern Bell Telephone Company and American Telephone and Telegraph Company.

Of Counsel:
GEORGE E. ASHLEY,
32 Avenue of the Americas,
New York, New York.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

	Page
Opinions below	1
Statement of case	2
Questions presented for review	2
Reasons for denying writ	3
I. There are no grounds presented by petitioner to warrant further review	3
II. The trial court decided the actual controversy between the parties and declared petitioner's rights on all issues presented by the record	3
A. The issues presented to the trial court	3
B. The trial court's determination of the issue	4
C. The trial court could not decide matters not in actual controversy	6
III. The findings of fact and conclusions of law were supported by the record and were adequately reviewed on appeal and petitioner was not denied due process of law	6
Conclusion	8
Proof of service	8

Cases Cited.

Aetna Life Ins. Co. v. Haworth, 300 U. S. 227 (1937)	6
Ashwander v. Tennessee Valley Authority, 297 U. S. 288 (1936)	6
Newmons v. Lake Worth Drainage Dist., 87 So. 2d 49, 50 (Fla. 1956)	7

Statute Cited.

28 U. S. C., § 2201	6, 8

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OPINIONS BELOW.

Since the filing of the Petition for Writ of Certiorari, the opinion of the District Court for the Northern District of Texas has been reported in 236 F. Supp. 537. The opinion of the Court of Appeals for the Fifth Circuit has now been reported in 338 F. 2d 1001.

STATEMENT OF CASE.

In 1929 Respondents installed a nine-duct conduit under the surface of what was then Floyd Street in Dallas, Texas. One long distance telephone cable was installed in the same year, and five additional cables were placed subsequently.

Floyd Street, owned in fee simple by the City of Dallas, was closed and was quitclaimed to abutting land owners in 1936. The quitclaim deeds excepted the easement of Respondents (Pl. Ex. 7, R. 205, 15; Pl. Ex. 8, R. 208, 17) and several subsequent conveyances included this exception (Pl. Ex. 10, R. 215, 18; Pl. Ex. 11, R. 218, 18; Pl. Ex. 12, R. 220, 18; Pl. Ex. 13, R. 223, 19; Pl. Ex. 14, R. 228, 19). Petitioner acquired title in 1951 (R. 80) and filed this suit to oust Respondents September 24, 1963 (R. 47).

A detailed statement of the facts is contained in the pretrial order entered by the District Court (R. 86-107).

QUESTIONS PRESENTED FOR REVIEW.

The questions presented by Petitioner for review appear to be:

(1) Whether Petitioner was denied the benefits of the Declaratory Judgment Act by the alleged failure of the trial court to declare Petitioner's rights on the issues presented; and

(2) Whether Petitioner was denied due process of law because of the trial court's alleged disregard of the record and the law and because of the Court of Appeal's alleged failure to review adequately the trial court's judgment.

REASONS FOR DENYING WRIT.

I.

There Are No Grounds Presented by Petitioner to Warrant Further Review.

The judgment of the District Court and its *per curiam* affirmance by the Court of Appeals was plainly correct and presents no special and important reason for review (Supreme Court Rule 19, 28 U. S. C. A.). All contested issues of law were agreed upon in a pre-trial order, and all were decided. The evidence was stipulated and undisputed, and it clearly supports the trial court's decision on each issue of law. Petitioner has made no showing to justify the Supreme Court's review.

II.

The Trial Court Decided the Actual Controversy Between the Parties and Declared Petitioner's Rights on All Issues Presented by the Record.

A. **The issues presented to the trial court.**

Petitioner complains that it did not receive a declaration of its rights, but that only the rights of the Respondents were declared. On the contrary, the trial court answered completely the issues submitted by the parties. Based upon Petitioner's complaint and Petitioner's contentions at the pre-trial hearing, both parties agreed in the pre-trial order (R. 108-09) that the contested issues of law were:

> "(1) Do Defendants have an easement across and under the land involved by virtue of a grant or other writing or authority?
>
> (2) Do Defendants have an easement across and under the land involved by prescription?

(3) Is Plaintiff estopped to deny the existence and the nature and extent of Defendants' easement across and under Plaintiff's land?

(4) If Defendants have an easement, what is the nature and extent of it?

(5) Does Plaintiff's Complaint allege a real, actual, justiciable controversy between the parties, and does such a controversy in fact exist between the parties, insofar as Plaintiff's Complaint relates to a request for judgment declaring the rights and duties of the parties with respect to the land involved?

(6) Would Plaintiff's proposed use, if any, of the land involved constitute an unreasonable interference with Defendants' easement?

(7) Is Plaintiff's claim and cause of action barred by Article 5529, Vernon's Civil Statutes of Texas, the Four-Year Statute of Limitations?

(8) Is Plaintiff's claim and cause of action for damages and other compensation barred by the provisions of Article 5526, Vernon's Civil Statutes of Texas, the Two-Year Statute of Limitations?

(9) Is Plaintiff's claim and cause of action barred by reason of laches?" (R. 108-09).

B. **The trial court's determination of the issue.**

The trial court resolved the first three of the above contested issues of law by holding, on the basis of the stipulated evidence, that Respondents have a valid easement by (1) grant, (2) prescription, (3) estoppel, and (4) statute (R. 124-25). The existence of any one of these sources of title sustained the trial court's judgment. Conversely, each of these four trial court holdings, declaring a valid and subsisting easement, must be reversed as having no merit in order for Petitioner to prevail.

The trial court's conclusion of law No. 2 clearly defines the rights and privileges to be enjoyed by the Respondents in the use of their easement. This statement, as in any declaration of the rights of the owner of a dominant estate, declares correlatively the limitations imposed upon Petitioner's use of the servient estate and settles the fourth contested issue of law.

The trial court's conclusion of law No. 6 held that the claimed cancellation or reformation of the recorded, written agreement between the Respondents and one of Petitioner's predecessors in title was barred by the four-year statute of limitations, thus answering the seventh contested issue of law, and that it was also barred by laches, thus answering the ninth contested issue of law. The trial court's determination that Respondents have an easement eliminated Petitioner's claim for damages and rent; this rendered moot the applicability of the two-year statute of limitations and thus answered the eighth contested issue of law.

Petitioner introduced evidence concerning the construction of a building which had been proposed in 1962 (Pl. Exs. 22, 23, 24, R. 22-23), and admitted at trial that it had no present plans or specifications for a building (R. 43-44). The court found that the structure proposed in 1962 would have constituted an unreasonable interference with Respondents' easement, and because there were no present plans for any building, further declaratory relief could not be granted. This resolved the fifth and sixth contested issues of law to the extent the record would permit.

Petitioner's complaint that it did not receive a declaration of its rights but that only the rights of Respondents were declared is wholly without merit. The foregoing analysis shows that the trial court fully answered each of the nine contested issues of law submitted by the parties.

C. **The trial court could not decide matters not in actual controversy.**

The holdings of the trial court were determinative of the actual controversy between the parties which existed at the time of trial and were as complete and comprehensive a statement of the correlative rights and duties of the parties as the court could make on the record before it.

Petitioner now complains that the trial court was derelict in its duty by not informing Petitioner whether it could build on its land and by failing to define the type of structure which could be constructed. Of course, Petitioner can build on his land, and the trial court did not hold otherwise. It simply refused to render an advisory opinion regarding the type of hypothetical structure which could be built. To have done otherwise would have exceeded the scope of the Declaratory Judgment Act, 28 U. S. C., § 2201. **Aetna Life Ins. Co. v. Haworth,** 300 U. S. 227 (1937). Claims based merely upon potential invasion of rights and general contentions between the parties which have not ripened into an actual controversy do not warrant a declaratory judgment. **Ashwander v. Tennessee Valley Authority,** 297 U. S. 288 (1936).

III.

The Findings of Fact and Conclusions of Law Were Supported by the Record and Were Adequately Reviewed on Appeal and Petitioner Was Not Denied Due Process of Law.

The Petitioner's charge that there was an absence of judicial standards in the trial court is vague and indefinite as to its meaning and certainly is without support on the record. Such an extreme charge deserves detailed documentation which is entirely lacking. The uncontested, stipulated facts set forth in the pre-trial order (R. 86-107)

and the formal Stipulation of the parties (R. 75-82) fully support every Finding of Fact and Conclusion of Law entered by the trial court (R. 113-25).

The Court of Appeals, after oral argument and review of the uncontested, stipulated facts, could render no decision other than an affirmance of the judgment of the trial court. Because the Court of Appeals wrote a *per curiam* opinion, Petitioner charges that the court "glossed" over the alleged error of the trial court in a "rubber-stamp" fashion and failed to give proper consideration to the matters in dispute. There is not one specific allegation set forth by Petitioner to substantiate its unwarranted attack upon the Court of Appeals. Petitioner's recitation of facts not supported by the record and its abstract statements of law not applicable to this case cannot justify the inferences Petitioner draws from the rendering of a *per curiam* opinion. Evidently, Petitioner is not aware of the significance of a *per curiam* opinion.

> "Traditionally, a 'per curiam' is the opinion of the court in which the judges are all of one mind and the question involved is so clear that it is not considered necessary to elaborate it by an extended discussion. Such an opinion carries no less weight because of the nomenclature that designates it as such." **Newmons v. Lake Worth Drainage Dist.**, 87 So. 2d 49, 50 (Fla. 1956).

The obvious conclusion to be drawn from the fact that a *per curiam* opinion was rendered in this case is that the Circuit Judges were unanimously of the opinion that the decision of the District Judge was supported by the record and declared the rights of the parties as to those matters actually in controversy.

CONCLUSION.

There has been no violation of the rights guaranteed Petitioner by the Fifth Amendment to the Constitution of the United States, and Petitioner's rights were fully declared under 28 U. S. C. § 2201. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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F. MARK GARLINGHOUSE,
1010 Pine Street,
St. Louis, Missouri,

ED GOSSETT,
J. H. HAND,
308 South Akard Street,
Dallas, Texas,

KENNETH R. MADSEN,
DONALD W. MEEKER,
811 Main Street,
Kansas City, Missouri,

Attorneys for Respondents Southwestern Bell Telephone Company and American Telephone and Telegraph Company.

Of Counsel:

GEORGE E. ASHLEY,
32 Avenue of the Americas,
New York, New York.

Proof of Service.

I, F. Mark Garlinghouse, one of the attorneys for Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on

the 1st day of March, 1965, I served a copy of the foregoing Brief of Respondents in Opposition to Petition for Writ of Certiorari on the Athenian Realty Corporation, Petitioner herein, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to its attorney, Jarrell Garonzik, 1305 Tower Petroleum Building, Dallas, Texas, and to its attorney, Freeman L. Mittenthal, Dallas Federal Savings Building, Dallas 1, Texas.

.....

F. Mark Garlinghouse.